

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
1111 20th Street, N.W.  
Washington, D.C. 20036



Date: March 2, 1989

Case No: 88-INA-341

In the Matter of

DONE-RITE, INC.,  
Employer

on behalf of

IVANCO TASEVSKI,  
Alien

Mark B. Swillinger, Esq.  
For the Employer

Before: Litt, Chief Judge; Vittone, Deputy Chief Judge; and  
Brenner, DeGregorio, Guill, Schoenfeld, and Tureck  
Administrative Law Judges

NICODEMO DeGREGORIO  
Administrative Law Judge

**DECISION AND ORDER**

This application was submitted by the Employer on behalf of the above-named Alien pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(14) (hereinafter "the Act"). The Employer requested review from U.S. Department of Labor Certifying Officer's denial of a labor certification application pursuant to 20 C.F.R. Section 656.26.<sup>1</sup>

Under Section 212(a)(14) of the Act, an alien seeking to enter the United States for purposes of performing skilled or unskilled labor is ineligible to receive a visa unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of the application for a visa and admission into the United States and at the place where the alien is to perform the work; and (2) the employment of the

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<sup>1</sup> All regulations cited in this decision are contained in Title 20 Code of Federal Regulations.

alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of Part 656 of the regulations have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means, in order to make a good faith test of U.S. worker availability.

This review of the denial of the labor certification is based on the record upon which the denial was made, together with the request for review, as contained in an Appeal File ("AF"), and written arguments of the parties [see Section 656.27(c)].

### Statement of the Case

On March 23, 1987, the Employer filed an application for alien certification (AF 25) to enable the Alien to fill the position of Pipe Fitter, DOT Code 862.381-018. Employer which is located in Western Springs, Illinois, installs and maintains industrial pipe systems. The duties of the job were described as follows:

Installation and maintenance of industrial pipe systems including sewer systems, water pipe systems, steam boiler, compression air, gas and oxygen pipe systems. Acetylene welding, arch welding and solder and sweat piping torches used in job.

Five years of experience in the job was required.

Following the issuance of the Notice of Findings ("NOF") by the Certifying Officer ("CO") on March 14, 1988 (AF 16-21), and Employer's rebuttal on April 12, 1988 (AF 14, 15), the Final Determination denying certification was issued on April 25, 1988 (AF 11-13).

### Discussion

The State Agency referred 14 applicants for the Pipe Fitter job to the Employer (AF 22-24). In a letter dated December 31, 1987 (AF 32, 33), the Employer explained why none of the U.S. workers were hired. George Shawtell was rejected because "he did not have any experience as a pipefitter." Joseph Benak "had no prior pipefitting experience with boilers" and "stated that he could not accept employment at this time because he was still working at another job".

Mr. Shawtell in a January 12, 1988 statement (AF 61) stated that he had worked as a pipe fitter in power plants, steel mills, chemical plants, oil refineries and sewage treatment plants doing all types of work required of a pipe fitter. Joseph Benak reported (AF 62) that boilers were not mentioned during his interview. He had called the Employer every other week after his interview until mid December when he advised the Employer that he had found a temporary job and would need to give one week's notice if he was accepted for the job. Based on these two

statements the CO concluded in his NOF that Employer did not have a bona fide job offer open to U.S. workers, citing 20 C.F.R. § 656.20(c)(8) and § 656.21(b)(7). Employer was given the opportunity to submit evidence and arguments rebutting all of the bases of the NOF or showing that the defects noted therein had been cured. (AF 20, 21).

The Employer in rebuttal stated (AF 15) that after receiving the NOF it called Mr. Shawtell's home on March 17 and 25, 1988. On each occasion a woman answered the phone and stated Mr. Shawtell was working. She was advised that the Employer should be called about the Done Rite job, but Mr. Shawtell never called back. Mr. Benak was called twice in March and once in April 1988. Each time a woman answered the phone and stated that Mr. Benak was working. She too was instructed that Mr. Benak should call about the job in question. Again, no call was received from the worker.

In its brief, Employer disputes the CO's conclusion that Employer did not have a bona fide job open to U.S. workers. Employer further argues that the applicants' follow-up letters are self-serving and that Employer has the right to verify the information contained therein; that Employer made good faith efforts to recruit U.S. workers, but as a result of the first interview found them to be unqualified; that Employer's efforts to recontact the workers were not responded to by the applicants; and that, therefore, they were not available.

In his application for employment completed by Mr. Shawtell on November 4, 1987 (AF 51, 52), the worker reported that he had worked for three separate employers as a pipe fitter between 1964 and 1987. The reason for leaving each job was unrelated to the quality of his work. Likewise, Mr. Benak's application for employment listed work as a pipe fitter for four separate employers between 1980 and 1987 (AF 55, 56). His employment had continued for each employer as long as work was available. Both workers authorized contact with their former employers and both dispute the Employer's assertion concerning their qualifications and availability for the job. In each case, there is no credible evidence of record which disputes the workers' claim that they are qualified to perform the duties outlined in item 13 of ETA Form 750-A.

The Employer has the burden of proving that the U.S. workers were rejected for lawful job-related reasons. Here, the weight of the evidence is that both George Shawtell and Joseph Benak were able, willing, qualified and available to perform the duties of the job of a pipe fitter. Hence, their rejection was for other than lawful job-related reasons.

In sum, according to the Employer's recruitment report of December 31, 1987, Shawtell and Benak had been rejected for lack of relevant experience. Based on the follow-up letters from the two applicants, the CO in his NOF found that both applicants did have the required experience, and gave the Employer an opportunity to rebut this finding. On rebuttal, the Employer did not contest the finding, but contended that Shawtell and Benak had apparently found other jobs. In effect, the Employer abandoned its initial position and conceded that both applicants were qualified for the job, 20 C.F.R. § 656.25(e)(3), but alleged a new ground for their rejection, that they were no longer willing or available in March 1988.

In our view, the CO was correct in concluding that the rebuttal evidence was not responsive to his NOF and did not cure the wrongful rejection of Shawtell and Benak when they applied for the job. See Dresshoppers Lingerie, 88-INA-6 (February 23, 1988); Dove Homes, Inc., 87-INA-680 (May 25, 1988). As the CO put it in his Final Determination, "the key question is not whether the applicants are still available for the position five months after it was offered, but rather whether the applicants were initially lawfully rejected in the first place." (AF 5).

ORDER

The Certifying Officer's determination denying labor certification is AFFIRMED.

NICODEMO DeGREGORIO  
Administrative Law Judge

Washington, D.C.

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